United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 18-0348**
	)	**Issued: December 30, 2019**
DEPARTMENT OF THE ARMY, WATERVLIET ARSENAL, Watervliet, NY, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On December 11, 2017 appellant, through counsel, filed a timely appeal from a September 5, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish binaural hearing loss causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On March 3, 2011 appellant, then a 55-year-old engineering technician, filed an occupational disease claim (Form CA-2) for binaural hearing loss which he attributed to factors of his federal employment including prolonged exposure to loud noise. He identified March 1, 2011 as the date he first became aware of his hearing loss and realized its relation to his federal employment.

OWCP subsequently received employing establishment hearing conservation audiograms dating back to June 22, 1982. Appellant also provided information regarding his private sector employment history from 1971 through 1982, and a description of his various duties with the employing establishment beginning in 1982. In a March 8, 2011 statement, the employing establishment concurred with appellant's description of his various duties beginning in August 1982, and his exposure to loud noise in the workplace. It also provided data on decibel level exposure at the employing establishment.

OWCP prepared a May 4, 2011 statement of accepted facts (SOAF) and on May 12, 2011 referred appellant for a second opinion examination with Dr. Michael Schrom, a Board-certified otolaryngologist.

In a June 15, 2011 report, Dr. Schrom noted his examination of appellant and his history of exposure to loud noise. He diagnosed bilateral, symmetrical, flat middle to high-frequency sensorineural hearing loss. Dr. Schrom noted appellant's family history was significant for hearing loss in his father who also worked in a factory with loud noises. He advised that the external auditory canals, tympanic membranes, and drum motility were normal. Dr. Schrom noted that tympanograms were normal bilaterally. Audiometric testing was conducted on Dr. Schrom's behalf and testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed the following: right ear losses of 20, 45, 45, and 50 decibels (dBs); and left ear losses of 20, 50, 45, and 45 dBs. Dr. Schrom noted progression of appellant's hearing loss over the past 29 years, but minimal change since 1995. He opined that appellant's hearing loss pattern was typical of genetic hearing loss with a baseline that showed borderline hearing in 1982. As such, Dr. Schrom opined that the pattern of hearing loss was not typical of noise exposure and was not causally related to appellant's occupational exposures. In response to questions provided by OWCP, he replied "Yes" as to whether appellant showed a sensorineural loss that is in excess of what would be normally predicated on the basis of presbycusis and "No, pattern of loss is genetic" when asked whether appellant's workplace exposure was sufficient as to intensity and duration to have caused the loss in question.

By decision dated August 22, 2011, OWCP denied the claim finding that the medical evidence of record was insufficient to establish that the hearing loss was causally related to workplace noise exposure.

On September 9, 2011 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on December 15, 2011

Appellant submitted a November 9, 2011 report from Dr. David W. Martin, a Board-certified otolaryngologist, who examined appellant and noted that he worked as a machinist since 1982 where noise levels measured from 81 to 100 dBs. Dr. Martin diagnosed sensorineural hearing loss. He noted that the external auditory canals, tympanic membranes, and drum motility were normal. Dr. Martin advised that audiometric findings revealed bilateral sloping sensorineural hearing loss with a 4,000 Hz notch on the left most consistent with noise-induced hearing loss. He further noted that noise levels in machine shops were quite high and could contribute to hearing loss.

By decision dated March 7, 2012, an OWCP hearing representative affirmed, with modification, the August 22, 2011 decision. He found that appellant had established that he was exposed to noise at work, but that the medical evidence of record was insufficient to establish that his hearing loss was causally related to the accepted employment exposures.

On October 22, 2012 appellant requested reconsideration. He submitted an October 11, 2012 report from Dr. Martin who noted appellant's history of noise exposure as a machinist. Dr. Martin diagnosed sensorineural hearing loss. He opined that appellant's hearing loss was causally related to his occupational noise exposure. Dr. Martin noted that documented noise levels in appellant's workplace were greatly elevated and prolonged exposure to elevated noise levels correlated strongly with hearing loss. He indicated that even with hearing protection appellant could easily encounter ambient noise levels of over 80 dBs based on the documented noise levels of the machines he worked with on a regular basis for 30 years. Dr. Martin indicated that appellant had no family history of hearing loss so a genetic cause was less likely.

By decision dated March 27, 2013, OWCP denied modification of the March 7, 2012.

On March 3, 2014 appellant requested reconsideration. He submitted a December 3, 2013 letter from Dr. Martin who noted appellant's history of noise exposure and diagnosed sensorineural hearing loss. Dr. Martin graphed appellant's percentage of binaural hearing loss starting from an audiogram dated June 22, 1982 which reflected zero percent binaural hearing loss with a clear upward trend to the most recent audiogram dated October 21, 2013, which revealed 32.5 percent hearing loss. When graphing, there was a "clear progressive loss" of hearing which correlated to his work for the employing establishment. Dr. Martin noted that Dr. Schrom opined that appellant's hearing loss was typical of genetic loss, but appellant reported the only person in his family with hearing loss was his father who had occupational exposure to noise as a gunner in the Navy. He reviewed the percentage of binaural loss and noted a clear correlation to the percentage of binaural loss with the time appellant was employed at the employing establishment.

In a February 25, 2014 report, Dr. Martin advised that there was no evidence of genetic hearing loss in appellant's family. He referenced an attached article on hearing loss, which noted that the notch at 4,000 Hz is a "well-established clinical sign" and can be of value in confirming noise-induced hearing loss. Dr. Martin indicated that his graph of appellant's hearing loss since 1982 showed a relationship between his hearing loss and his employment.

By decision dated April 28, 2014, OWCP denied modification of the March 27, 2013 decision.

On April 24, 2015 appellant requested reconsideration. He submitted a report from Dr. Martin dated April 22, 2015. Dr. Martin noted that appellant's hearing loss began when he started working at the employing establishment, it progressed while employed, and his hearing loss leveled off when exposure to the noise discontinued after he left his employment. He noted a 4,000 Hz notch was a well-established clinical sign confirming the diagnosis of noise-induced hearing loss, and appellant's hearing loss correlated strongly with exposure to noise at the workplace. Dr. Martin referenced an audiogram dated April 2, 2015, an article on hearing loss, and slides from a presentation on hearing loss.

By decision dated June 26, 2015, OWCP denied modification of the April 28, 2014 decision.

On May 26, 2016 appellant, through counsel, requested reconsideration and submitted a May 18, 2016 report from Dr. Ernest Lee, a Board-certified otolaryngologist.

In a May 18, 2016 report, Dr. Lee noted examining appellant and noted his history of exposure to workplace noise. He diagnosed binaural sensorineural hearing loss and binaural noise-induced hearing loss. Dr. Lee agreed with Dr. Martin's assessment that appellant had bilateral moderate-to-severe sensorineural hearing loss that certainly resulted from past noise exposure in the workplace. He indicated that appellant's hearing loss leveled off since his noise exposure in the workplace ended. Appellant reported that his father wore hearing aids later in life, but he had been subjected to hazardous noise in the Navy. Dr. Lee opined that, by history and audiogram findings, appellant's sensorineural hearing loss, in large part, may be related to past noise exposure. He recommended bilateral amplification.

By decision dated August 17, 2016, OWCP denied modification of the June 26, 2015 decision.

On June 23, 2017 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a report dated June 15, 2017, Dr. David Bromberg, a Board-certified otolaryngologist, examined appellant and noted that baseline audiometry performed in 1982 was normal. He further noted that serial audiograms performed from 1982 to the present showed gradually progressive hearing loss, until he was no longer working near loud sounds. Dr. Bromberg diagnosed bilateral severe high-frequency loss with significant compromise in speech reception threshold. He noted that appellant worked in noisy environments with noise levels between 80 and 100 dBs. Dr. Bromberg reviewed Dr. Schrom's report and concurred in his findings that there was a genetic basis for appellant's hearing loss, but he opined that because a person was more sensitive to hazardous noise exposure did not mitigate the causal relationship between the hearing loss and noise exposure.

In a supplemental report dated June 26, 2017, Dr. Bromberg noted that whether or not a person has a genetic predisposition to hearing loss, noise exposure was an independent aggravating

event in hearing loss. He noted that those individuals with a genetic predisposition to hearing loss would still have their hearing adversely affected by hazardous noise levels.

By decision dated September 5, 2017, OWCP denied modification of the August 17, 2016 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[7]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.[8] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment factors identified by the employee.[9]

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[3] *Supra* note 2.

[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

[8] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[9] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

ANALYSIS

The Board finds that appellant has met his burden of proof to establish binaural hearing loss causally related to the accepted factors of his federal employment. The Board further finds that the case is not in posture for a decision as to the extent of appellant's binaural hearing loss.

OWCP undertook development of the case and referred appellant to Dr. Schrom. In his June 15, 2011 report, Dr. Schrom diagnosed bilateral, symmetrical, flat middle to high-frequency sensorineural hearing loss. He noted a progression over the past 29 years, but minimal change since 1995. Dr. Schrom noted the pattern of hearing loss was typical of genetic hearing loss with a baseline, which showed borderline hearing loss in 1982. He opined that the pattern of hearing loss was not typical of noise exposure. In response to questions from OWCP, Dr. Schrom provided conclusory opinions responding "No, pattern of loss is genetic" when asked whether appellant's workplace exposure was sufficiently severe to cause the hearing loss and "Yes" as to whether the hearing loss was in excess of that predicted due to presbycusis. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition was related to employment factors.[10] Therefore, Dr. Schrom's opinion is of limited probative value on the issue of causal relationship.

The Board finds that the medical reports submitted in support of his claim by Drs. Martin, Lee, and Bromberg are based on an accurate factual history and the audiometric reports of record and provide rationalized opinions on the issue of causal relationship. All three physicians are qualified in their field to opine on the issue of causal relationship.

Dr. Martin noted that appellant's audiometric findings revealed bilateral sloping sensorineural hearing loss with a 4,000 Hz notch on the left which was most consistent with noise-induced hearing loss. He discussed appellant's sources of noise exposure and opined that appellant's hearing loss was related to his occupational noise exposure. Dr. Martin explained that the documented noise levels in his workplace were greatly elevated and his prolonged exposure to elevated noise levels correlated with the progressive nature of his hearing loss. In support of his opinion, he graphed the audiometric findings to demonstrate a "clear progressive loss" while working for the employing establishment and a reduction of the progression when removed from noise exposure. Dr. Lee noted his agreement with the causation opinion provided by Dr. Martin and further opined that, by history and audiogram findings, appellant's sensorineural hearing loss, in large part, could be due to past employment-related noise exposures. Finally, Dr. Bromberg opined that appellant's hearing loss was employment related. He explained that the audiograms from 1982 to present showed gradually progressive hearing loss, until the cessation of exposure to loud noise. Dr. Bromberg accurately noted the accepted levels of noise exposure and countered Dr. Schrom's opinion that a genetic predisposition was the sole basis for hearing loss, explaining that because a person was more sensitive to hazardous noise exposure did not mitigate causal relationship between the hearing loss and noise exposure.

The Board finds that the medical opinions of Drs. Martin, Lee, and Bromberg are based upon a complete and accurate factual and medical background, are provided with a reasonable

[10] *D.L.*, Docket No. 19-0900 (issued October 28, 2019); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017); *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

degree of medical certainty, and are supported by medical rationale establishing causal relationship between the accepted employment factors of noise exposure and the diagnosed condition.[11] When weighed against the contrary, unrationalized opinion of Dr. Schrom, who was selected by OWCP, the Board finds that appellant has met his burden of proof to establish binaural hearing loss causally related to the accepted factors of his federal employment.[12]

CONCLUSION

The Board finds that appellant has met his burden of proof to establish binaural hearing loss causally related to the accepted factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 30, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

[11] *See supra* note 9.

[12] *See R.B.*, Docket No. 10-1013 (Issued February 4, 2011); *Fred D. Hartford*, Docket No. 54-150 (issued February 28, 1955).